No. 98-404



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

*Appellants,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

*Appellees.*

**On Appeal from the United States District Court for the District of Columbia**

## BRIEF OF APPELLEES CITY OF LOS ANGELES, *ET AL.* IN SUPPORT OF APPELLANTS

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## QUESTIONS PRESENTED

1. Whether the Census Act, 13 U.S.C. §§ 1, *et seq.* (1994 & Supp. II 1996), prohibits the Secretary of Commerce from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

2. Whether the Census Clause of the Constitution, Article I, Section 2, Clause 3, which requires Congress to conduct an "actual Enumeration" of the population, prohibits the use of statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

3. Even if statistical sampling may not be used to adjust the census for apportionment purposes, whether the Census Act requires that it be used to adjust the census data for other purposes, such as the distribution of federal funds and redistricting, where -- as is the case here -- the Secretary has determined that statistical sampling is feasible.

## PARTIES TO THE PROCEEDING BELOW

1. APPELLANTS (defendants in the District Court):

   The United States Department of Commerce; William M. Daley in his capacity as Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, in his capacity as Acting Director of the Bureau of the Census.

2. APPELLEE (plaintiff in the District Court):

   United States House of Representatives.

3. APPELLEES (intervenor-defendants in the District Court):

   **City of Los Angeles, *et al.***: City of Los Angeles, CA; State of New Mexico; City of New York, NY; County of Los Angeles, CA; City of Chicago, IL; City and County of San Francisco, CA; County of Miami-Dade, FL; City of Inglewood, CA; City of Houston, TX; City of San Antonio, TX; City and County of Denver, CO; City of Long Beach, CA; City of San Jose, CA; City of Stamford, CT; City of Oakland, CA; City of Cudahy, CA; County of Santa Clara, CA; County of San Bernardino, CA; County of Alameda, CA; County of Riverside, CA; U.S. Conference of Mayors; League of Women Voters of Los Angeles; and the following Members of Congress -- Carolyn Maloney; Christopher Shays; Tom Sawyer; Rod Blagojevich; Bobby Rush; Luis Gutierrez; John Conyers, Jr.; Jose Serrano; Cynthia McKinney; Charles Rangel; Donald Payne; Howard Berman; Xavier Beccera; Loretta Sanchez; Julian Dixon; Henry Waxman; Maxine Waters; Esteban Torres; Sheila Jackson Lee. After this initial group was allowed to intervene, the following parties were granted permission by the District Court to intervene and, being represented by the same counsel, joined with the initial group: City of Detroit, MI; City of Bell, CA; City of Gardena, CA; City of Huntington Park, CA; and the following Members of Congress -- Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez; Carlos Romero-Barcelo.



   In compliance with Rule 29.6, none of the City of Los Angeles, *et al.* appellees are parent corporations, subsidiaries or affiliates of any entities that have outstanding securities in the hands of the public.

4. APPELLEES (intervenor-defendants in the District Court):

   **Richard A. Gephardt, *et al.***: Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M. Slaughter; Bennie G. Thompson, individually and in their official capacities as Members of the United States House of Representatives.

5. APPELLEES (intervenor-defendants in the District Court):

**Legislature of the State of California, *et al.***: Legislature of the State of California; the California Senate; John Charles Burton, individually and as President Pro Tempore of the California Senate; the California Assembly; and Antonio Villaraigosa, individually and as Speaker of the California Assembly.

6. APPELLEES (intervenor-defendants in the District Court):

**National Korean American Service & Education Consortium, Inc., *et al.***: National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra.



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# BRIEF OF APPELLEES CITY OF LOS ANGELES, *ET AL.* IN SUPPORT OF APPELLANTS

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## STATEMENT OF THE CASE

### A. Introduction

Appellees City of Los Angeles, *et al.* ("Los Angeles-Appellees") intervened as defendants in the district court. The Los Angeles-Appellees are a non-partisan group that includes the State of New Mexico, some of America's most populous cities and counties, the U.S. Conference of Mayors, the League of Women Voters, and a bipartisan group of more than twenty Members of Congress, including the bipartisan co-chairs of the House Census Caucus. This

diverse assembly of government entities, individuals and organizations joins with appellants and the other intervenor-defendant appellees in defending the use of statistical sampling in the decennial census. If statistical sampling is permitted, the Census Bureau will conduct the most accurate and cost-effective census possible in the year 2000, and reverse the hardship and unfairness that results from differentially undercounting certain groups of Americans -- including minorities, children, renters and the poor -- in the census.

**B. The Decennial Census Is Plagued by the Invidious Problem of the Differential Undercount.**

The decennial census never has been a headcount of the population. Since its inception in 1790, Americans have been undercounted. *See* Joint Appendix ("J.A.") at 344-45 (Declaration of Margo Anderson ("Anderson Decl.") ¶¶ 7-8).[1] Over the years, the Federal Government has tried to make the census more accurate, but has never succeeded entirely. *See* J.A. at 46-47 (*The United States Department of Commerce, Bureau of Census, Report to Congress -- The Plan for Census 2000* (revised and reissued August 1997) ("*Census 2000*")); *id.* at 345-50 (Anderson Decl. ¶¶ 8-15).

[1] Professor Margo Anderson, Professor of History and Urban Studies at the University of Wisconsin-Milwaukee, is universally recognized as the preeminent authority on the history of the U.S. Census. She testified by declaration in the district court, concluding that the history of the U.S. Census has been one of constant innovation in an effort to improve accuracy, and that the use of statistical sampling would be just another step in this evolutionary process. *See generally* J.A. at 342-52 (Anderson Decl. ¶¶ 1-17).



In the modern era, however, a problem more invidious than undercounting emerged: differential undercounting. Differential undercounting is the difference in the undercount of one subgroup of the population, for example, African-Americans, compared to another subgroup, for example, non-African-Americans. *See Wisconsin v. City of New York*, 517 U.S. 1, 7 (1996). Certain population subgroups -- including ethnic and racial minorities, recent immigrants, renters, children, and the poor -- are consistently undercounted at much higher rates than other groups. *See generally* J.A. at 48-52 (*Census 2000*). For instance, between 1940 and 1980, while the undercount of the general population apparently decreased, the undercount of African-Americans remained at three to four percentage points above the net undercount of non-African-Americans. *See Wisconsin*, 517 U.S. at 7 ("In the 1980 census, for example, the overall [net] undercount was estimated at 1.2%, and the undercount of blacks was estimated at 4.9%."); J.A. at 49 (*Census 2000*).

This Court has recognized that "[b]ecause the heavily undercounted groups are not evenly distributed over the country, the differential rates of undercounting produce divergences between the actual relative population of particular areas and those indicated by the census." *Kirkpatrick v. Preisler*, 394 U.S. 526, 539 n.3 (1969) (Fortas, J., concurring). These "particular areas" include the government entities filing this brief, such as the State of New Mexico, home to many Native Americans, Hispanics, and the rural poor; the urban centers of Los Angeles and New York, the port of entry for many recent immigrants and home to growing minority populations; counties like Miami-Dade, Florida and Alameda, California, which have large

Hispanic populations; and cities like Inglewood, California where African-Americans comprise the majority.

### C. The 1990 Census: the Trend Towards Greater Accuracy Reversed.

The 1990 census took a large "step backward on the fundamental issue of accuracy." J.A. at 47-48 (*Census 2000*). Despite being the most costly and purportedly comprehensive census ever undertaken, the 1990 census was the first census in forty years to be less accurate than its predecessors. Gross errors resulted in more than 26 million people being improperly counted: approximately 11 million people were erroneously included ("overcounted"), while roughly 15 million people were not counted at all or not counted in the correct block. *Id.* at 374-75 (Declaration of Stephen Elliot Fienberg ("Fienberg Decl.") ¶¶ 37-39).[2] This yielded a net national undercount of approximately 4 million Americans -- or 1.6% of the population -- significantly worse than in 1980. *Id.* at 375; *see also id.* at 40, 48 (*Census 2000*).

Not surprisingly, the differential undercount also worsened. *Id.* at 47-48 (*Census 2000*). The 1990 undercount rate among African-Americans was six times greater, among

[2] Professor Fienberg is a Maurice Falk University Professor of Statistics and Social Sciences at Carnegie Mellon University, and one of the country's leading experts on the use of statistical sampling in the U.S. Census. He has authored 14 books and more than 200 papers on the subject of statistical methods. The statistical sampling techniques planned for the 2000 census are described in some detail in his declaration. *See generally* J.A. at 353-80 (Fienberg Decl. ¶¶ 1-45).



Hispanics (all races) seven times greater, and among Native Americans living on reservations, more than seventeen times greater than among non-Hispanic Whites. *Id.* at 49. These disturbing differential undercounts also occurred among children and renters. Despite being only 26 percent of the national population, children under the age of 18 accounted for 52 percent of the undercount in 1990. *Id.* at 48-49. While urban homeowners had a net undercount of 0.09 percent in 1990, renters in urban and rural areas had a net undercount of 4.17 percent and 5.92 percent, respectively. *Id.* at 49.

The enumeration methods employed by the Census Bureau in 1990 caused populations with high concentrations of minority and low-income residents to experience undercounting at levels significantly higher than the national average. This was determined by a post-enumeration survey, a form of statistical sampling, conducted by the Census Bureau following the 1990 census. According to final results of the survey, published in August 1992, the State of New Mexico suffered the largest percentage undercount of any State, and many of the cities and counties among the Los Angeles-Appellees found themselves at the top of the list of the most undercounted populations.[3]

The Census Bureau candidly acknowledges that the societal trends that led to the differential undercounting in the 1990 census likely will cause even greater inaccuracies in the 2000 census, unless statistical sampling methods are used to adjust the census results. *See id.* at 42, 54.

[3] *See* Table 1 in Appendix.

**D. Differential Undercounting Is More Than Just Bad Math; It Adversely Affects the Lives of Real People.**

While the sheer magnitude of the number of persons missed in the past is troubling, the effects of the differential undercount are devastating. The Census Bureau concedes:

> [a]s a result of the inaccuracy in the 1990 Census, many Americans were denied an equal voice in their government. Federal spending employing population-based formulas -- for schools, crime prevention, health care, and transportation -- was misdirected.

*Id.* at 49.

The groups of people who are most severely undercounted live mostly in America's urban centers, and in poor rural areas. Because the apportionment of everything from Congressional districts to city council seats depends (at least in part) on census data, those who live in undercounted areas suffer from vote dilution: they are denied the constitutional guarantee of "one-person, one-vote."

In addition, differential undercounting causes grave financial harm to the States and local governments where the undercounted reside. Among other things, distribution of federal funds to States and local governments often depends on census figures. Consequently, if a State, city, or county's population is undercounted, it will lose millions of dollars each year.[4] Yet, it still must provide mandated

[4] *E.g.*, Declaration of Joseph J. Salvo (Exhibit C of the Affidavits in Support of Motion to Intervene as Defendants of Intervenors City of Los Angeles, et al. (filed Apr. 3, 1998) ("Affidavits in Support") ¶ 17 (City of New York anticipates losing approximately $100 million dollars)); Affidavit of Wayne Bannister (Exhibit D of Affidavits in Support) ¶ 10(a),(b) (Los Angeles County expected to lose $204 million); Affidavit of Jesus H. Garza (Exhibit J of Affidavits in Support) ¶ 5 (City of San Antonio anticipates losing $21.3 million).



services to its residents, even those who were not counted. This hurts all of its residents, whether they are among the undercounted groups or not, because funds that would have been used for other programs must be diverted to provide mandated services to those who were not counted. Thus, the consequences of this underfunding impact both mandated programs and discretionary programs serving all residents.[5]

The Census Bureau recognizes that "[t]aking Census 2000 the same way the 1990 census was taken would result in an expected undercount of at least 1.9 percent of the population (more than 5 million people) and would cost at least $675 million more than the current plan." J.A. at 43 (*Census 2000*). Population undercounts in the 2000 census are expected to continue to cost affected states, cities and counties millions in lost federal funding.[6] Unless the

[5] *E.g.* Affidavit of Tom Udall (Exhibit U of Affidavits in Support) ¶ 8 (State of New Mexico funding shortfalls adversely affect the State's ability to provide police, water works, sewers, roads and schools); Affidavit of Susan S. Muranishi (Exhibit S of Affidavits in Support) ¶¶ 5, 6 (Alameda County programs such as the Job Training Partnership Program, Federal Community Development Block Grants, and the Childhood Lead Poisoning Prevention Program underfunded due to census undercounting).

[6] *E.g.*, Bannister Aff., *supra*, ¶ 10 (Los Angeles County estimated to lose $20 million per year in the first decade of the new century); Affidavit of Gary Graves (Exhibit Q of Affidavits

Census Bureau conducts the 2000 census employing a limited use of statistical sampling, the people residing within the boundaries of, or represented by, the Los Angeles-Appellees will continue to be unfairly deprived of federal and state resources.

**E. The Census 2000: A Solution to Differential Undercounting.**

After reviewing the reports of three separate, independent panels established by the National Academy of Sciences that studied over a six year period the undercounting problems of the 1990 census, the Census Bureau released a report to Congress regarding its plan for conducting the 2000 census. *See generally* J.A. at 34 (*Census 2000*). The plan calls for the limited use of statistical sampling in conjunction with traditional data-collecting techniques. Those statistical methods include the use of sampling that is "scientifically based; improves accuracy; eliminates the traditional undercount of children, renters and minorities; and saves money." *Id.* at 81. The Census Bureau's use of statistical sampling has been endorsed by the National Academy of Sciences, the Census Bureau's Advisory Committees, a "Blue Ribbon" panel of the American Statistical Association, the American Sociological Association, the General Accounting Office, and other scientific experts. *Id.* at 83-84.

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in Support) ¶ 10 (Santa Clara County projects a loss of $57.3 million in the first decade); *see also* Affidavit of Rexford Olliff (Exhibit B of Affidavits in Support) ¶¶ 6-12 (because of undercounting, the City of Los Angeles will not receive its fair share of funds from various funding programs dependant on census data).



The Census Bureau is confident that its plan for the 2000 census will mitigate the net undercounting of the total population and differential undercounting, and result in "the most accurate and cost-effective census possible" in the year 2000. *Id.* at 40. It predicts that use of statistical methods in the 2000 census will decrease net undercounting inaccuracies to 0.1 percent nationally, 0.5 percent at the State level, and 0.6 percent at the Congressional district level, and reduce or eliminate the differential undercount, all while lowering costs. *Id.* at 44. Not a scintilla of contrary evidence was introduced in the district court.

Unfortunately, the Census Bureau's effort to improve the decennial census fell victim to partisan infighting.[7] A temporary compromise was struck when Congress passed, and President Clinton signed into law, the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111

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[7] Speaker of the House Newt Gingrich reportedly feared that an accurate census count may result in a shift of House seats from the Republicans to the Democrats. *See, e.g.*, John Mercurio, "Clinton May Use Recess to Appoint New Census Chief," *Roll Call* (Jan. 15, 1998), available in LEXIS, GENFED, ROLL CL. The Speaker has not always held these views. In 1991, Gingrich wrote to then-Commerce Secretary Robert Mosbacher to complain of "a serious negative impact" on Georgia because of undercounting there, noting that the undercount had cost his home state an additional Congressional seat. He asked that Georgia's census numbers be readjusted upward and voted to pass the 1991 bipartisan legislation authorizing the studies concerning the use of scientific sampling in the decennial census. A copy of the letter dated April 30, 1991, is attached as Exhibit B of Memorandum in Support of Motion of the City of Los Angeles, et al. to Intervene As Defendants.

Stat. 2440, 2480-87 (1997) ("1998 Appropriations Act"). Among other things, the 1998 Act provided that either house of Congress could bring a lawsuit blocking implementation of the Census Bureau's plan for the 2000 census. On February 20, 1998, Speaker of the House Newt Gingrich filed this lawsuit in the United States District Court for the District of Columbia, nominally on behalf of the House of Representatives, to prevent the use of statistical sampling in the 2000 census. The district court granted the Los Angeles-Appellees' motions to intervene as defendants, as well as similar motions by several other groups. The defendants brought various motions to dismiss, and the House moved for summary judgment. The district court ruled that use of statistical sampling for apportionment purposes is prohibited by 13 U.S.C. § 195, entered judgment on behalf of the House, and enjoined the Federal Government defendants from using statistical sampling for purposes of Congressional apportionment. This appeal followed.

## SUMMARY OF ARGUMENT

The census is too important to the functioning of our democracy, and too central to the financial condition of State and local governments, to be made a pawn in an unseemly effort to gain political advantage, or to fall victim to legal sophistry. Accordingly, this brief focuses on three key points:

(1) The district court's backwards analysis of sections 141 and 195 of the Census Act, 13 U.S.C. §§ 1, *et seq.*, ignores their plain meaning. Read together, those sections plainly authorize the use of statistical sampling for apportionment purposes. But even if the Court decides those provisions are ambiguous, it



should defer to the Census Bureau's interpretation of the statute under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984).

(2) The Census Clause of the Constitution does not prohibit the use of sampling for purposes of apportionment. Instead, it expressly delegates to Congress the authority to conduct the census "in such Manner as they by law shall direct." The Framers debated and decided the rule upon which the apportionment of the House of Representatives would be based -- *i.e.*, the number of all the free inhabitants, but only three-fifths of the slave population -- not the method of taking the census. It defies both logic and history to argue -- as the House did below -- that although the Framers decided to apportion Congressional representation among the States on the basis of their respective populations, they also intended to prohibit techniques that would ensure the most accurate population assessment.

(3) Even if statistical sampling may not be used to adjust the census for apportionment purposes, the Census Act *requires* that it be used to adjust the census data for other purposes, such as the distribution of federal funds or redistricting. Thus, if this Court affirms the district court's judgment, the Secretary of Commerce must use statistical sampling to produce adjusted census results for all non-apportionment purposes.

## ARGUMENT

### I. Sections 141 and 195 of the Census Act Authorize the Secretary of Commerce to Use Statistical Sampling for the Purpose of Apportionment.

#### A. The Plain Text Permits Use of Statistical Sampling For Apportionment.

Giving the text its ordinary meaning and reading the Census Act as a whole, the import of sections 141(a) and 195 is plain: Congress delegated its "virtually unlimited discretion" over the conduct of the census to the Secretary of Commerce ("Secretary"), leaving it to the Secretary to decide whether to use statistical sampling in the decennial census for the purpose of apportionment. 13 U.S.C. §§ 141(a), 195; *see Wisconsin*, 517 U.S. at 19. For purposes other that apportionment, section 195 requires the Secretary to use sampling whenever -- as is the case here -- he considers it feasible.

##### 1. The Statutory Inquiry Is at an End Where Congress' Intent Is Expressed Plainly on the Face of the Statute.

The primary canon of statutory construction directs courts to glean meaning from the plain text. *See, e.g., Norfolk & W. Ry. v. American Trains Dispatcher's Ass'n*, 499 U.S. 117, 128 (1991). An equally important rule is that a court must give effect to each word and provision of the statute at issue. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955). This requires a court to harmonize statutory provisions so as to give each full force and effect. *See, e.g., Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989). As shown below, the Court can discern the meaning of sections 141(a) and 195



by applying these most elementary rules of construction to their plain text. "If the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842.

##### 2. Section 141 of the Census Act Authorizes the Secretary To Use Statistical Sampling for Apportionment Purposes.

In section 141(a), Congress expressly provided that the Secretary shall take the decennial census of population "*in such form and content as he may determine, including the use of sampling procedures.*" 13 U.S.C. § 141(a) (emphasis added). In *Wisconsin*, this Court held that, through section 141(a), Congress had delegated its "virtually unlimited discretion" to conduct the decennial census of population to the Secretary, 517 U.S. at 19, the same census that is to be used for apportionment purposes. *See* 13 U.S.C. § 141(b). Thus, the plain text of section 141 empowers the Secretary to employ sampling to determine the population for the purpose of apportionment of Congressional Representatives.

##### 3. Section 195 of the Census Act Does Not Apply to Apportionment.

In section 141(a), Congress authorized -- but did not require -- the Secretary to employ the use of sampling procedures in carrying out the decennial census. That section leaves to the Secretary's discretion whether to use sampling, since he is authorized to take the decennial census "in such form and content as he may determine." 13 U.S.C. § 141(a). That discretion -- but only as it relates to census functions *other than apportionment* -- is constrained by section 195, which provides:

> *Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States*, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195 (emphasis added). Thus, for purposes other than apportionment, the Secretary does *not* have the broad discretion afforded by § 141(a) to determine whether or not to use sampling. Rather, "if he considers it feasible" the Secretary "shall" use statistical sampling for non-apportionment purposes.

But section 195 does *not* similarly constrain the Secretary's discretion with respect to the use of sampling when determining the population for apportionment. In that area, the Secretary retains the broader discretion afforded by section 141(a). Plainly, section 195 does not prohibit the use of statistical sampling to apportion seats in the House; it simply does not apply to the subject.

### B. The District Court Failed To Properly Construe the Plain Text of the Census Act.

#### 1. The District Court's Analysis Was Backwards.

In interpreting sections 141 and 195, the district court inexplicably ignored the most fundamental tenets of statutory construction. Rather than begin its analysis with the text of the two sections, the district court started with the legislative history. It looked first to section 195 as it existed in 1957, as well as the legislative history surrounding the 1957 enactment of section 195. Jurisdictional Statement ("J.S.")



at 48a-50a (reprint of district court opinion in *United States House of Representatives v. United States Dep't of Commerce*, Civ. A. No. 98-0456 (D.D.C. Aug. 24, 1998) ("Opinion")). Thus, while accepted canons of construction required the lower court to turn first to the current text of the statutes, it started instead with an inquiry into the history of a statute long since amended. "As a method, this is just backwards, and however much we may be attracted by the result it produces in a particular case, we should in every case resist it." *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

The district court took this extra-textual odyssey back forty years in order to form a "background knowledge" it claimed is required to understand the plain text. *See* J.S. at 53a (Opinion). The court assumed, with virtually no analysis, that as originally enacted in 1957, section 195 prohibited the use of sampling for purposes of apportionment. Although the court acknowledged that section 195 was amended in 1976, it gave no serious consideration to the import of simultaneous amendments to section 141 authorizing the use of sampling for all purposes. Thus armed, and without regard to the context provided by other sections of the same act -- especially section 141(a) -- the district court next parsed section 195 using purportedly analogous hypotheticals about birthday cakes and wedding dresses. *See id.* at 51a-53a. Ignoring express authorization for the use of sampling for apportionment in section 141(a), the district court finished its analysis of the text of section 195 by proclaiming that "a prior understanding [*i.e.*, the 1957 version of section 195 and the "special" nature of apportionment] demands the conclusion that whether to use statistical

sampling is not to be left to the discretion of the Secretary of Commerce." *Id.* at 53a.

Having already concluded that section 195 "indisputably proscribes" the use of sampling for apportionment, the district court half-heartedly attempted to harmonize it with sections 141(a) and (b). *See id.* at 59a-62a. Again, it proceeded backwards. It should have looked at the various sections and attempted to construe them in harmony, rather than first construing section 195 in isolation. But, having already fixed on an erroneous interpretation of section 195, the court found it conflicted with section 141(a), a dilemma it resolved by improperly applying the rule that more specific statutes govern more general provisions. *Id.* at 61a-62a. Following this twisted path, the district court held that the plain text of section 195 bars use of statistical sampling in the decennial census for the purpose of apportionment of the House.

In an effort to bolster its flawed statutory analysis, the district court returned to the legislative history. Once again, its reasoning was deficient. The district court ignored that at the very same time that Congress amended section 195, it enacted section 141(a), expressly authorizing the use of sampling in the decennial census. Instead, it lamented that it could not find anything in the legislative history of section 195 to the effect that Congress intended to permit the use of sampling in connection with apportionment. *See id.* at 54a-59a. Evoking the imagery of *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980), the district court likened the situation to a watchdog that did not bark. *See* J.S. at 55a (Opinion). Colorful as the district court's allusions to



birthday cakes, wedding dresses, and barking dogs may be, they are no substitute for sound analysis.

### 2. Of Birthday Cakes and Wedding Dresses: The District Court's Improper Analysis of Sections 195 and 141.

Asserting that "an exception from a command to do 'X' more often than not represents a prohibition against doing 'X' with respect to the subject matters covered in the exception," *id.* at 52a, the district court turned to hypothetical analogies about birthday cakes and wedding dresses in an effort to support its conclusion that section 195 prohibits the use of statistical sampling for apportionment. But neither its assertion about the meaning of exceptions, nor its analogies, prove its point.

To its credit, the district court conceded that there are instances where an exemption from a command does not operate as a prohibition. *See id.* at 52a. The court acknowledged a few examples from the United States Code. *Id.* at 51a-52a. It could have listed many more. For example, suppose a mother tells her teenaged son: "Except for weekends, you must be home by 8:00 p.m." She is not *prohibiting* her son from getting home on Saturday night before 8:00 p.m. She is not addressing the weekend curfew at all. Her son can't tell from that statement alone what the rule is for Saturday night.

Similarly, although section 195 tells the Secretary he "shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling'" when determining the population for purposes other than apportionment -- *e.g.*, the distribution of federal funds to the States or redistricting

-- it does not tell him whether using sampling for apportionment purposes is permissible. Certainly, it does not *prohibit* it.

Where can the Secretary find the answer? In section 141(a), where Congress directs him to take the decennial census "in such form and content as he may determine, including the use of sampling procedures." 13 U.S.C. § 141(a).

If the district court had actually attempted to harmonize sections 195 and 141, it would have seen that its hypothetical analogies were incomplete. For example, the court hypothesized that someone gave the following directive: "'Except for Mary, all children at the party shall be served cake.'" J.S. at 51a (Opinion). The court concluded that the person who issued the directive "would be quite surprised to learn that Mary had been served cake." *Id.* at 52a. Similarly, the district court considered a hypothetical directive by a granddaughter: "'except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners.'" *Id.* at 53a. According to the court, the granddaughter must have intended to prohibit taking her grandmother's wedding dress to the cleaners. *Id.* It reached this conclusion "because of our background knowledge concerning wedding dresses: We know that they are extraordinarily fragile and of deep sentimental value to family members. We therefore would not expect that the decision to take a [wedding] dress to the cleaners would be purely discretionary." *Id.* The court then likened the apportionment function to the wedding dress. *Id.* Because apportionment is "special," the court could not believe that whether to use statistical sampling for



apportionment could be left to the discretion of the Secretary "absent a more direct congressional pronouncement." *Id.*

Of course there is a "direct congressional pronouncement:" section 141(a). The lower court just neglected to consider it in connection with its hypotheticals. If it had, the complete hypotheticals would read:

*Birthday Cake*:

> "You have discretion to give Mary some cake." (Section 141(a))
>
> Except for Mary, all children at the party shall be served cake. (Section 195)

*Wedding Dress*:

> "You have discretion to take my grandmother's wedding dress to the cleaners." (Section 141(a))
>
> "Except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners." (Section 195)

Thus completed, the district court's expectation that the person who issued the directive "would be quite surprised to learn that Mary had been served cake" becomes baseless. Similarly, when the wedding dress analogy is complete, the portion analogous to section 195 *cannot* reasonably be interpreted to prohibit cleaning the wedding dress. The context -- the portion of the hypothetical analogous to section 141(a) -- makes this clear no matter how "special" the

wedding dress may be. The wedding dress *may* be cleaned, while the other clothes *must* be cleaned.[8]

The incomplete nature of the district court's hypotheticals reflects its refusal to harmonize sections 141(a) and 195. Instead of using the plain text to divine Congressional intent, the district court resorted to speculation based on its view of the "special" nature of apportionment. *See id.* at 53a. By straying outside the four corners of the statute, the court missed the "direct congressional pronouncement" afforded by section 141(a). *See id.*

Moreover, by not confining its review to the text, and by refusing to harmonize sections 141(a) and 195, the district court manufactured a conflict between those sections. It purported to resolve this conflict by invoking the rule that a more specific statute controls over a more general one. *Id.* at 61a. But it botched that analysis as well. Section 195 is *not* "specific" with respect to the use of sampling for apportionment purposes. As noted above, it simply does not apply to the subject. Rather, that subject is governed only by section 141(a).[9]

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[8] Even the teenager's conundrum over his curfew can be resolved in this way, provided his mother addresses the subject:

> "You have discretion to stay out as late as you like on weekends." (Section 141(a))
>
> "Except for weekends, you must be home by 8:00 p.m." (Section 195)

[9] In a final effort to resolve the false conflict between sections 141(a) and 195, the district court resorted to looking at their respective titles. J.S. at 61a (Opinion). This, too, was improper and unnecessary. *See Pennsylvania Dep't of Corrections v. Yeskay*, 118 S. Ct. 1952, 1956, 141 L.Ed.2d 215 (1998) ("The



When sections 141 and 195 are harmonized and given full effect, their meaning is clear: the Secretary may, in his discretion, use sampling for apportionment of the House. He must use sampling for other purposes, if he considers it feasible. Prior to the district court's judgment, nearly every federal court to consider the issue had agreed. *See City of New York v. United States Dep't of Commerce*, 34 F.3d 1114, 1124-25 (2d Cir. 1994), *rev'd on other grounds*, 517 U.S. 1 (1996); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Carey v. Klutznick*, 508 F. Supp. 404, 414-15 (S.D.N.Y. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1334-35 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981). *But see Orr v. Baldrige*, No. IP 81-604-C (S.D. Ind. July 1, 1985).

### C. The Legislative History Confirms that Congress Authorized the Use of Sampling for Apportionment Purposes.

Even if resort to the legislative history was necessary -- and in light of the plain language of sections 141(a) and 195 it was not -- it cannot support the district court's conclusion.

#### 1. The Legislative History Supports the Census Bureau's Interpretation of Section 195.

The district court concluded that the pre-1976 version of section 195 prohibited the use of sampling for apportionment purposes. It therefore expected to hear some "barking dogs" in the legislative history if the 1976 amendments removed

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title of a statute . . . cannot limit the plain meaning of the text. For interpretative purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase.") (internal quotation marks omitted).

that prohibition. But the district court must have covered its ears. In 1976, Congress rewrote *both* sections 141 and 195. Pub. L. No. 94-521, 90 Stat. 2459, 2461, 2464 (1976). The 1976 legislation changed section 195 to its present form, and added -- for the first time -- section 141(a). As noted above, the new section 141(a) granted the Secretary discretion to use sampling in the decennial census, the basis for Congressional reapportionment. At the same time, section 195 was amended to eliminate any possible prohibition on the use of sampling for apportionment purposes, and to require its use, if feasible, for all other purposes.

These changes are reflected best in the words of the statute, but are also shown in the relevant reports. For example, the Senate Report states that section 141(a) was amended to encourage sampling in connection with the decennial census.[10] The House Report and Conference Report echo this thought.[11]

In contrast, there are no equally clear pronouncements in the legislative history that would support the district court's contrary conclusion. Rather, the legislative history relating to section 195 reaffirms the Congressional intent to increase the use of sampling "wherever possible."[12]

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[10] *See* S. Rep. No. 94-1256, at 4 (1976) ("New language is added at the end of the subsection to encourage the use of sampling and surveys in the taking of the decennial census.").

[11] *See* H.R. Rep. No. 94-944, at 2 (1976) ( House Report); H.R. Rep. No. 94-1719, at 11 (1976) (Conference Report).

[12] H.R. Rep. No. 94-944, at 6 (clarifying Congressional intent that, "wherever possible, sampling shall be used"); *see* S. Rep. No. 94-1256, at 6; *see also* H.R. Rep. No. 94-1719, at 13 ("The section as amended strengthens congressional intent that, whenever possible, sampling shall be used.").



### 2. Of Barking Dogs and Shifting Burdens: The District Court's Interpretation Repeals the 1976 Amendments to Section 195.

The district court felt it needed a more dramatic statement of Congressional intent if, as the court characterized it, Congress sought to "work a historic change in the manner in which the Secretary is permitted to conduct the apportionment enumeration." *See* J.S. at 54a (Opinion). It looked for, and missed (again), a "definitive signal from Congress" that the Secretary could depart from "past practices." *Id.* at 55a. Indeed, the court found the alleged silence of the Congressional "watchdogs" determinative of the fact that Congress could not have intended to give discretion to the Secretary to determine whether to use statistical sampling for apportionment purposes. *Id.* at 55a-57a. Once again, the district court's analysis suffered from profound flaws.

First, the district court overstates the "historic change" worked by the 1976 amendments. The history of the decennial census is one of innovation, and an ever increasing embrace of statistical methods.[13]

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[13] *See generally* J.A. at 347-352 (Anderson Decl. ¶¶ 10-17). Over the course of the century, the Census Bureau has carefully examined with growing confidence the science of statistics. The 1900 census law authorized the appointment of an assistant director who was an experienced statistician, as well as five chief statisticians. *Id.* at 347, ¶ 10. In the 1950's, the Census Bureau used statistics to understand the reasons for the undercount, and it was during this time that the post-enumeration survey ("PES") was

Second, the district court missed the "definitive signal from Congress" regarding this express change in law. That signal was section 141(a), amended at the same time as section 195. Congress "barked" through the language of the statute; that should have been sufficient for the district court.

> [T]he notion [is wrong] that Congress cannot be credited with having achieved anything of major importance by simply saying it, in ordinary language, in the text of a statute, 'without comment' in the legislative history. As the Court colorfully puts it, if the dog of legislative history has not barked nothing of great significance can have transpired. Apart from the questionable wisdom of assuming dogs will bark when something important is happening, we have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past.

*Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (citations omitted) (Scalia, J., dissenting).

Finally, the district court impermissibly shifted the burden of persuasion to the defendants. J.S. at 59a (Opinion).[14]

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first developed. *Id.* at 347-48, ¶¶ 11, 12. Starting with the 1970 census, and in every census since, the Census Bureau used a statistical method called imputation to make corrections to the census figures. J.A. at 81-82 (*Census 2000*).

[14] The district court contended that the defendants did not carry their "*Bock Laundry* burden" of showing the 1976 amendments were intended to change settled law J. *Id.* But the presumption established in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989), only applies in cases where an ambiguity in the text of a Federal Rule of Evidence purportedly changes a well-settled common law evidentiary rule, and therefore is inapposite. *See Tome v. United States*, 513 U.S. 150, 163 (1995); *Williamson v. United States*, 512 U.S. 594, 615 (1994) (Kennedy, J., concurring); *Bock Laundry Mach. Co.*, 490 U.S. at 521. As plaintiff and the party seeking summary judgment, the House had the burden of persuasion. It failed to carry it.



### D. The Census Bureau's Reasonable Interpretation of Sections 141 and 195 is Entitled to Deference Under *Chevron*.

If there is any doubt remaining on the statutory issue, it is easily resolved under the rule of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1986). Under *Chevron*, a court must defer to an agency's reasonable interpretation of a statute. *See id.* at 844. Assuming the Court finds section 195 ambiguous, the *Chevron* deference standard resolves the dispute, and the district court's judgment must be reversed.

#### 1. The Court Should Apply the *Chevron* Deference Standard to the Census Bureau's Interpretation of Section 195.

Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. For an agency's interpretation to be reasonable, the court need not conclude that the agency's construction is the only one permissible, nor that the agency's interpretation is the one the court would have reached. *Id.* at 844 n.11 (citing *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39

(1981)). If the agency's interpretation of the statute is reasonable, the court is not to impose its own construction of the statute. *Id.* at 843.

This Court should defer to the Census Bureau's interpretation. As noted above, Congress has delegated to the Secretary of Commerce the responsibility to take the decennial census. 13 U.S.C. § 141(a); *Wisconsin*, 517 U.S. at 5. In performing his duties under the Census Act, the Secretary is assisted by the Census Bureau (which is an agency within, and under the jurisdiction of, the Commerce Department) and the Census Bureau's head, the Director of the Census. 13 U.S.C §§ 2, 21; *Wisconsin*, 517 U.S. at 5. As the agencies responsible for administering the Census Act, the Commerce Department and Census Bureau reasonably have concluded that section 141(a) authorizes -- and section 195 does not prohibit -- the use of sampling to correct the decennial census of population. *See* J.A. at 133-38 (*Census 2000*).

### 2. The District Court's Summary Dismissal of *Chevron* Was Another Error.

The court below relegated its discussion of *Chevron*'s deference standard to a footnote. J.S. at 46a n.11 (Opinion). It gave three purported reasons why deference to the Census Bureau's interpretation was not appropriate: (1) plain text and legislative history left no doubt as to the Congressional intent underlying section 195; (2) because the Secretary has held different positions on section 195, less deference should be afforded his current opinion; and (3) the Secretary has not amply justified his change of position with a reasoned analysis. *Id.* None is valid.



First, as discussed above, neither the plain text nor the legislative history support the construction reached by the district court. Even if the district court disagreed with the Census Bureau's construction, it did not, nor could not, find that the Census Bureau's interpretation was unreasonable. Assuming the district court's construction is plausible -- which it is not -- and the Census Bureau's is reasonable -- which it is -- at best the court had established an ambiguity, in which case the *Chevron* deference standard is the tie-breaker. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[W]here the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction.").

Second, the district court's view that the Secretary's interpretation should be given less deference because the Secretary has taken another position in the past rings hollow because it gave the Secretary's interpretation no deference at all. More important, *Chevron* and its progeny have repudiated the significance of this holdover from earlier cases.[15] If a change of position is relevant at all, it is merely one factor to consider. *See Good Samaritan Hosp.*, 508 U.S. at 417. The weight this factor is given depends on the circumstance. *Id.* Here, it is entitled to none. The Secretary's

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[15] "This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." *Rust v. Sullivan*, 500 U.S. 173, 186 (1991). An agency need not "'establish rules of conduct to last forever,'" but rather "'must be given ample latitude to "adapt [its] rules and policies to the demands of changing circumstances."'" *Id.* (citing *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (citations omitted)).

change of position was not only justified, but required by the current state of the law. *See* J.A. at 133-38 (*Census 2000*) (discussing the case law that developed throughout the 1980's interpreting section 195 and the broad discretion recognized in the *Wisconsin* decision.) "The Secretary is not estopped from changing a view [he] believes to have been grounded upon a mistaken legal interpretation." *Good Samaritan Hosp.*, 508 U.S. at 417.

Finally, the district court's third reason -- that the Secretary failed to "amply justify" his change of position with a "reasoned analysis" -- is makeweight. As discussed above, changes in the law amply justified the shift in the Secretary's legal analysis. As for the affirmative decision to use scientific sampling, that too represents a carefully reasoned decision to adapt Census Bureau policies to improved statistical methods. In 1991, the Secretary declined to implement an adjustment of the 1990 census primarily because he was not yet comfortable with the statistical approach of the time.[16] The Secretary explicitly left open the possibility of using sampling in the 2000 census after

[16] Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population, 56 Fed. Reg. 33,582, 33,583 (July 15, 1991) (statement of Robert A. Mosbacher, Secretary of Commerce) ("There was a diversity of opinion among my advisors. The Special Advisory Panel split evenly as to whether there was convincing evidence that the adjusted counts were more accurate....Ultimately, I was compelled to conclude that we cannot proceed on unstable ground in such an important matter of public policy.").



conducting further research.[17] Six years later, in their report to Congress, the Commerce Department and Census Bureau explained how after long-term, detailed study, much of it Congressionally-mandated, they "determined that Census 2000 would be rendered more accurate and more cost-effective by the introduction of limited sampling in addition to traditional methods of enumeration." J.A. at 138 (*Census 2000 Report*). This analysis is ample.[18]

### 3. The District Court's Interpretation of Section 195 Results in Legislation by Judicial Fiat.

There is yet another reason for deferring to the Census Bureau's interpretation. In 1997, the House of Representatives passed a bill to amend section 141(a) by expressly prohibiting sampling in the census data used to apportion the House, but it was vetoed.[19] The House should not be

[17] *Id.* at 33,584.

[18] The district court also attempted to bolster its erroneous interpretation of section 195 by invoking the doctrine that statutes should be construed to avoid "serious constitutional questions." J.S. at 49a (Opinion). As shown below, this case raises no "serious" constitutional issues. And in any event, this Court has cautioned: "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a Constitutional question," especially where "nothing in the legislative history remotely suggests a legislative intent contrary to Congress' chosen words." *United States v. Locke*, 471 U.S. 84, 96 (1985); *see also Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1228, 140 L. Ed. 2d 350 (1998) (doctrine inapplicable where majority has no grave doubts as to constitutionality).

[19] Supplemental Appropriations and Rescissions Act, H.R. 1469, 105th Cong., 1st Sess., tit. VIII, § (b)(1) (1997).

permitted to in effect enact the same legislation through resort to the courts.

> For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

*Furman v. Georgia*, 408 U.S. 238, 468 (1972) (Rehnquist, J., dissenting). "There are no considerations of policy or practical need which should lead us, by judicial fiat, to do that which Congress, after full study of the subject, has failed to do." *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 106 (1946) (Stone, J., dissenting).

## II. The Constitution Does Not Prohibit the Use of Sampling in the Decennial Census.

The Constitution requires only that a census be conducted every ten years, leaving it to Congress to decide how the census will be conducted. The original text of article I, section 2 (before its amendment by section 2 of the Fourteenth Amendment) read as follows:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, *according to their respective Numbers*, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The *actual Enumeration* shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, *in such Manner as they shall by Law direct*. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.



U.S. Const., art. I, § 2, cl. 3 (emphasis added).

In the district court, the House contended that the phrase "actual Enumeration" requires a head-by-head count of the populace, and precludes the use of statistical sampling in the census.[20] Relying on various snippets of the debates at the Constitutional Convention, taken entirely out of context, the

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[20] Although the lower court did not reach this constitutional issue, this Court should not hesitate to resolve it now. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 823-24 (1968) (this Court will decide an issue not resolved below where it has persuasive prudential reasons for doing so, and further proceedings below would serve no useful purpose). As detailed in the Joint Motion to Expedite Consideration of Jurisdictional Statement, the Census Bureau needs a prompt resolution of the issue if it is to conduct the most accurate census possible. Congress has recognized the need for prompt resolution of the issue. *See 1998 Appropriations Act*, 111 Stat. 2482, § 209(e)(2). Because it is a pure legal issue, no purpose would be served by remanding for consideration by the district court.

House argued that the Framers insisted on a "headcount" as a way to avoid political manipulation of the census. But contrary to the House's arguments, there is nothing in the text of the Apportionment or Census Clauses, or in the debates that resulted in the formulation of their text, that proscribes the use of statistical sampling in the decennial census or prescribes a particular method of collecting census data. Rather, the Framers expressly provided that the census was to be conducted "*in such Manner as [Congress] shall by law direct.*"

### A. "Enumeration" Simply Means "Census" -- the Ascertaining of the Number of People.

The best clues to the meaning of "Enumeration" as used in the Census Clause come not from any dictionary, but from the Constitution itself. Article I, section 2 tells us that representatives are to be apportioned among the States "*according to their respective Numbers*" of inhabitants.[21] In other words, "in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants." *Wesberry v. Sanders*, 376 U.S. 1, 13-14 (1964). Article I, Section 2 goes on to say that *"The actual Enumeration" -- i.e.*, the actual ascertainment of the number of inhabitants -- is to be performed within three years after the first meeting of Congress and, thereafter, every "*ten years.*" *"[U]ntil such enumeration" -- i.e.*, the "actual Enumeration" -- is made, each State received an initial allocation of representatives. Congress was given "virtually unlimited discretion" to conduct the

[21] The same language is used in Section 2 of the 14th Amendment.



enumeration "*in such Manner as they shall by Law direct.*" *Wisconsin*, 517 U.S. at 19.

The word "Enumeration" appears again in the Constitution in article I, section 9, clause 4: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." Before this clause was revised during the final days of the Convention, it read, "No capitation tax shall be laid, unless in proportion to *the census herein before directed to be taken.*" *See* J.A. at 397 (Rakove Decl. ¶ 17); 2 *The Records of the Federal Convention of 1787* (hereinafter "*Records*"), at 596 (emphasis added) (Max Farrand, ed. 1911).

Two revisions were subsequently made to this clause at the close of the Convention. First, the phrase "or other direct tax" was inserted after "capitation." Second, and more important, the words "or enumeration" were inserted after "census." In the exact language of Madison's notes, "On motion of Col: [George] Mason, 'or enumeration' inserted after, *as explanatory of Census.*"[22] J.A. at 397-98 (Rakove Decl. ¶ 17); 2 *Records* at 596, 618 (Mason, September 14) (emphasis added). In other words, "census" and "enumeration" were used synonymously.[23]

[22] For further documentation, *see Supplement to Max Farrand's The Records of the Federal Convention of 1787*, at 269 (James H. Hutson ed., 1987).

[23] Even the House acknowledged that the use of the terms "census" and "enumeration" in Article I, § 9, cl. 4 "suggests [that] 'census' was synonymous with 'enumeration of inhabitants.'" *Memorandum for Plaintiff United States House of Representatives in Support of Its Motion for Summary Judgment* at 48 n.35. In

Dictionary definitions also support the conclusion that "Enumeration" simply means a census, or the ascertaining of the number of inhabitants. According to the *Oxford English Dictionary*, a comprehensive source that traces the meaning of words over time, since at least 1577, one meaning of "enumeration" -- indeed, the first meaning given -- is "the action of ascertaining the number of something; esp. the taking a census of population; a census." 5 *Oxford English Dictionary* 311 (1989).[24] The same dictionary defines census as "[a]n official enumeration of the population of a country or district, with various statistics relating to them." 2 *Oxford English Dictionary* 1031 (1989). Thus, "census" is defined as an "enumeration," and "enumeration" is defined as the ascertaining of the number of something; if that "something" is people, then "enumeration" means "census." Nothing in the definitions of "census" or "enumeration" dictate a particular method of ascertaining the number, and thus cannot prohibit the use of sampling.

That "Enumeration" means "census," and nothing more, is also supported by the fact that the Framers used the term "census" throughout the debates on the rule of apportionment. For example, Edmund Randolph proposed "that in order to ascertain the alterations in the population & wealth

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that memorandum, the House correctly cites *A Compendious Dictionary of the English Language* 46, edited by Noah Webster in 1806, as defining census to mean "an enumeration of inhabitants." *Id.*

[24] *See also* Samuel Johnson, 1 *A Dictionary of the English Language* 319 (1756); Thomas Sheridan, 1 *A Complete Dictionary of the English Language* (1790) (unpaginated) (both defining "enumeration" as the "act of numbering or counting over").



of the several States the Legislature should be required to cause a *census*, and estimate to be taken within one year after its first meeting; and every __ years thereafter -- and that the Legislre. arrange the Representation accordingly." 1 *Records* at 570-71 (Randolph, July 10) (emphasis added, blank in original). Similarly, Gouverneur Morris rejected this proposal for fixing a period for "taking a *census*." *Id.* at 571 (Morris, July 10) (emphasis added). It was only after the debates were completed, when the Committee of Style was reworking the draft of the Constitution, that the phrase "actual Enumeration" was substituted, without comment. J.A. at 391, 395-97 (Rakove Decl. ¶¶ 10, 15-16); 2 *Records* at 571, 590-91.

More important, the Framers continued to use the word "census" when referring to the phrase "actual Enumeration" even after the Constitutional Convention adjourned. For example, the word "census" is substituted for "actual Enumeration" in *The Federalist*. In a discussion of taxation and article I, section 9, in *Federalist No. 36*, Alexander Hamilton refers to the "actual Enumeration" required in section 2 as "[a]n actual census or enumeration."[25] In *Federalist 54*, James Madison wrote that "the accuracy of the *census* to be obtained by the Congress" should be greatly

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[25] "Let it be recollected that the proportion of these taxes is not to be left to the discretion of the national legislature, but is to be determined by the numbers of each State, as described in the second section of the first article. *An actual census or enumeration* of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression." *The Federalist* No. 36, at 220 (Hamilton) (Clinton Rossiter ed., 1961).

promoted by the linking of both representation and taxation to the census numbers. *The Federalist* No. 54, at 340 (Madison) (Clinton Rossiter ed., 1961) (emphasis added). If "actual Enumeration" required a head-by-head count for accuracy, Madison would have said as much. Instead, Madison argued that accuracy would be assured because any temptation on the part of a State to overstate its population would be counterbalanced by a desire to avoid taxes based on population. *Id.*; *see* J.A. at 398-99 (Rakove Decl. ¶ 19). Finally, in *Federalist 58*, James Madison described the "Enumeration" set forth in article I, section 2 as follows: "within every successive term of ten years a *census of inhabitants* is to be repeated." *The Federalist* No. 58, at 356 (Madison) (Clinton Rossiter ed., 1961).

**B. The Word "Actual" in "Actual Enumeration" Was Used to Distinguish the Census From the "Conjectural Ratio" Used to Allocate House Seats Before the First Census.**

According to Thomas Sheridan's 18th century dictionary, the word "actual" meant "really in act, not merely potential; in act, not purely in speculation." Thomas Sheridan, *A General Dictionary of the English Language* (1784). It is also clear from the context, and the use of the phrase "actual census" during the debates, that the phrase "*actual* Enumeration" was used to differentiate the census that was to be conducted "within three years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years," from the "conjectural rule" that apportioned Representatives among the States for the initial period before the first census. *See* U.S. Const. art. I, § 2.



That initial allocation of Representatives to the first House of Representatives was proposed by a committee and consisted of a "mere conjecture" based on rough estimates of each state's population and wealth. 1 *Records* at 579 (Randolph, July 11). Mr. Sherman "wished to know on what principles or calculations the Report was founded. It did not appear to correspond with any rule of numbers." *Id.* at 559 (Sherman, July 9). Mr. Gorham, one of the committee members, responded that "[s]ome provision of this sort was necessary in the outset. The number of blacks and whites with some regard to supposed wealth was the general guide." *Id.* (Gorham, July 9). Gouverneur Morris later added that "[t]he Report is little more than a guess." *Id.* at 560 (Morris, July 9). The committee revised the initial apportionment of seats and increased the number from 56 to 65. *Id.* at 563 (July 10).

The "conjectural ratio," *id.* at 578 (Mason, July 11), used for the initial apportionment was, in the context of the debates at the Convention, juxtaposed to an "actual census." For example, Madison records Mason's dissatisfaction with the pre-census apportionment as follows: "Mr. Mason did not know that Virginia would be a loser by the proposed regulations but had some scruple as to the justice of it. He doubted much whether the conjectural rule which was to precede the census, would be as just, as it would be rendered by an *actual census*." *Id.* at 602 (Mason, July 13) (emphasis added); *see also* J.A. at 394 (Rakove Decl. ¶ 13). Elseworth also noted that "the rule will be unjust until an *actual*

*census* shall be made." 1 *Records* at 602 (Elseworth, July 31) (emphasis added).[26]

Thus, "actual Enumeration" means simply an "actual" or "real" census of the people, as opposed to the initial "conjectural ratio" assigned for the pre-census period. This interpretation of "actual Enumeration" is consistent with the plain meaning of the sentence, and constitutional clause, that contains the phrase. The subject of the sentence --"the what"-- is the "actual Enumeration" as opposed to the initial "conjectural ratio" set forth at the end of the clause; the "when" is within three years of the first meeting of Congress and then every subsequent ten years, and the "how" is "in such manner as they [Congress] shall by Law direct."

### C. The "Permanent & Precise Standard" That The Framers Of The Constitution Decided Upon Was The Rule Upon Which The Apportionment Of The House Of Representatives Would Be Based And Not The Method Of Conducting The Census.

Although the House argued otherwise before the Court below, there was no debate at the Constitutional Convention over what method should be used to conduct the census for the purposes of reapportionment. The House's contention -- that the "permanent & precise standard" (George Mason's phrase) sought by some of the delegates at the Convention was a head-by-head count -- is specious and completely devoid of any historical support. It amounts to "junk history," and was thoroughly debunked in the lower court by the

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[26] A similar comparison was made by Wilson Nicholas at the Virginia Ratifying Convention of 1788. 2 *The Founders' Constitution* 135 (1987).



eminent Pulitzer Prize-winning historian, Professor Jack N. Rakove. J.A. at 388 (Rakove Decl. ¶ 6).[27] The "permanent & precise standard" referred to by Mason was a rule of apportionment, and reapportionment: (1) based on the "number of inhabitants," and (2) constitutionally required on a periodic basis. 1 *Records* at 578 (Mason, July 11). That "standard" had absolutely nothing to do with any particular mode of conducting the census. That was left for Congress to decide. As explained by Professor Rakove:

> the "*permanent & precise standard*" that delegates such as George Mason (quoted here) sought was to be determined by establishing a constitutional rule of reapportionment itself, not by specifying a mode of collecting data. What was at issue throughout this controversy, and what the delegates were explicitly addressing, were fundamental principles of representation itself. Was it legitimate or not to count slaves for purposes of representation, even though they could never be regarded as citizens in any sense of the term? Could the Union itself last if equitable rules for reapportionment were not explicitly incorporated in the text of the Constitution, to assure Americans that they

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[27] Rakove is the Coe Professor of History and American Studies at Stanford University, and the country's leading authority on the original intent of the Framers, as revealed by primary sources documenting the politics and ideas that lead to the making of the Constitution. His Pulitzer Prize-winning book, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) ("*Original Meanings*"), examines the history and adoption of the Constitution, and is the definitive text on that subject.

> would not sacrifice or dilute their political rights by migrating westward? If representation was to be based on both persons and property -- as the link to direct taxation and the inclusion of slaves suggested -- was not a simple population count the most accurate and convenient index of wealth? *These were the true questions that the delegates addressed in early July 1787 -- not the secondary matter of exactly how census data was to be compiled. That subject was in fact never debated per se; it was discussed only within the context of asking whether a population count provided the most convenient method of estimating wealth.*

J.A. at 386-87 (Rakove Decl. ¶ 5) (emphasis added).

James Madison's day-to-day notes of the debate demonstrate that the delegates' goal was to determine a substantive rule of reapportionment; they were wholly unconcerned with the mode of collecting census data. *Id.* at 391-92 (¶ 10). The initial proposal for the rule of apportionment was based on numbers of inhabitants alone. 1 *Records* at 532-33 (Mason, July 5). Gouverneur Morris had two objections to this proposed rule. First, he thought that because property was the "main object of Society" it should also be included as part of the measure of apportionment. *Id.* at 533 (Morris, July 5). Second, he felt strongly that the number of representatives from the Atlantic states should be "irrevocably fixed" so that these states would not later be outvoted by the new Western states. *Id.* at 534.

After Morris offered his proposal, and following some debate, the Convention appointed a new committee to



address the issue of apportionment. *Id.* at 540-42 (July 6). In a report issued on July 9, 1787, the committee proposed an initial apportionment for the first legislature of 56 seats divided among the states, and for subsequent apportionments "that the Legislature be authorized from time to time to augment the number of representatives" based on the principles of wealth and number of inhabitants. *Id.* at 559 (Morris, July 9).

The Framers rejected wealth alone as a basis for apportionment, in part because wealth would be difficult to measure -- it was "too indefinite and impracticable" to be a viable rule. *Id.* at 582 (Mason, July 11), 603 (Randolph, July 13). But wealth was never rejected as a factor to be considered in apportioning representation. The delegates became committed to giving the slaveholding states some representational credit for "their peculiar form of wealth in human beings," and thus "adopted the fiction that population, although not a perfect way of estimating wealth, was the most convenient and accurate means of doing so avail-

able."[28] J.A. at 393-94 (Rakove Decl. ¶ 12); *see also* 1 *Records* at 587 (Ghorum, July 11), 605 (Wilson, July 13).

Nonetheless, the Southern delegates were understandably wary of giving the almost certain to be Northern-dominated first Congress the discretion to decide whether or when to reapportion. *See, e.g.*, 1 *Records* at 592 (Pinkney, July 12). Thus, Edmund Randolph proposed on July 10, "that in order to ascertain the alterations in the population and wealth of the several states the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every ___ years thereafter -- and that the Legislature arrange the Representation accordingly." *Id.* at 570-71 (Randolph, July 10) (the blank is in the original).

In response, Gouverneur Morris expressed concern that constitutionally requiring Congress to take a periodic census would "fetter" the Legislature too much. *Id.* at 571 (Morris, July 10). He "candidly urged the Convention to coalesce in denying the future Western interior states the prospect of gaining control of the national legislature" by leaving it to

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[28] In addition, the Southern delegates believed that their States should receive additional House Seats for the contribution slavery made to the national welfare, and that the Constitution should explicitly provide for a measure of slaves. *Original Meanings* at 72-75. The North's accommodation of the South's demand resulted in the ignominious "three-fifths rule:" all free persons (other than most Native Americans) were counted as a "whole" person, but slaves only as three-fifths of a person. The three-fifths compromise reflected the view that slaves were human property, and enabled the slave-holding states to obtain the additional seats in the House they believed they both deserved and needed as security against the North. The Northern delegates viewed this "accommodation with slavery as the price of union." *Id.* at 73.



the Congress -- which would be dominated by the Northern states -- to determine whether or when to conduct a census for reapportionment. J.A. at 392-93 (Rakove Decl. ¶ 11); 1 *Records* at 571, 581-82, 583-84 (Morris, July 10, 11). Morris recognized that it was possible, though argued that it was not probable, that if "left at liberty" the Legislature would "never readjust the Representation." 1 *Records* at 571 (Morris, July 10).

Morris' position alarmed Southern delegates such as George Mason, Edmund Randolph, and James Madison. Mason responded that he did not object to "the conjectural ratio" that would prevail at the outset, *i.e.*, the number of representatives assigned to each State by the Committee for the initial House. However, he considered a "Revision from time to time according to some permanent & precise standard" to be essential to fair representation. *Id.* at 578 (Mason, July 11). He argued that according to the present population of America, the North "had a right to preponderate," but that the North should not continue to dominate the House when it no longer had a basis to do so. *Id.* Thus, Mason advocated that a "principle" must be "inserted in the Constitution" that would permanently ensure fair representation for all in the future -- this was a constitutionally mandated reapportionment based on a periodic census.

Mason also recognized the need for precision. He favored apportionment based on the relative wealth of the States, but like other delegates recognized that wealth was difficult to measure. So Mason accepted population as a proxy for wealth. He was, therefore, willing to accede to Randolph's proposal to base apportionment on population, urging "that numbers of inhabitants; though not always a

precise standard of wealth, was sufficiently so for every substantial purpose." *Id.* at 579.

Thus, the "permanent & precise standard" urged by Mason -- and ultimately adopted by the delegates -- was a constitutionally fixed reapportionment based on a periodic census of inhabitants. It is "permanent" in that the Constitution requires reapportionment every ten years. It is "precise" in that reapportionment is based on the "number of inhabitants" of each State, rather than some indefinite measure of wealth. Mason said nothing about the method by which the census should be conducted. There was absolutely no discussion at the Constitutional Convention about a headcount or any other possible mode of census taking. J.A. at 386-87 (Rakove Decl. ¶ 5).

### D. An Accurate Census Serves the Constitutional Objective of Equal Representation.

Equal representation -- one person, one vote -- is the polestar of article I, section 2 of the Constitution. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). In discussing intrastate redistricting plans, the Court has recognized that adopting a standard based on data other than "population equality, *using the best census data available*, would subtly erode the Constitution's ideal of equal representation." *Karcher v. Daggett*, 462 U.S. 725, 731 (1983) (emphasis added) (citations omitted). Undoubtedly, an accurate census serves this fundamental constitutional purpose. Even though the Constitution grants Congress "virtually unlimited discretion in conducting the decennial" census, that broad grant is delimited by "keeping in mind the constitutional purpose of the census," *i.e., equal representation*. *See Wisconsin*, 517 U.S. at 19-20. It is absurd,



therefore, to suggest that the Framers would hamstring Congress with inaccurate physical headcounts when other more accurate and reliable methods of ascertaining the population are available. That absurd result follows, however, if -- as the House contends -- "actual Enumeration" requires a physical headcount.

While the Constitution does not require a certain level of accuracy be achieved in the census, it does not prohibit accuracy from being sought. Previously, this Court has refrained from making judgment calls regarding the magnitude of accuracy in final census figures. *See Wisconsin*, 517 U.S. at 18 (refusing to choose between "numerical accuracy or distributive accuracy," or ". . . gross accuracy to some particular measure of accuracy"). Indeed, this Court found that "the Constitution itself provides no real instruction on this point," and "'[t]he polestar of equal representation does not provide sufficient guidance to allow us to discern a *single constitutionally permissible course*.'" *Id.* (emphasis added). The text provides no guidance and no "single constitutionally permissible course" because the Framers intended to give Congress "virtually unlimited discretion" to determine the method used to collect census data. *Id.* at 19. To believe otherwise would senselessly impute to the Framers an intent to place form over substance, headcounts over accuracy.

Thomas Jefferson appreciated that each generation had the ability, if not the duty, to increase the collective knowledge of this Nation, and correct the mistakes of the past:

> When I contemplate the immense advances in sciences and discoveries in the arts which have been made within the period of my life, I look forward

> with confidence to equal advances by the present generation, and have no doubt they will consequently be as much wiser than we have been as we than our fathers were, and they than the burners of witches.[29]

To find that the Census Clause restricts the conduct of the decennial census to physical headcounts when -- after years of careful and deliberate study -- the Secretary has determined that statistical sampling in conjunction with traditional methods of data collection will produce a more accurate census, is to reject the lessons of the Enlightenment and return to old Salem. This Court should not venture down that dark course.

## III. Even If Statistical Sampling May Not Be Used To Adjust The Census For Apportionment Purposes, It Must Be Used For Other Purposes, Such As Distribution Of Federal Funds And Redistricting.

The district court held only that the use of statistical sampling to determine the population *for purposes of apportioning representatives in Congress among the States* violates 13 U.S.C. § 195, and enjoined the Federal Government only from using statistical sampling "to determine the population *for purposes of congressional apportionment.*" J.S. at 63a-64a (Opinion). Nothing in the judgment could preclude the Secretary from using statistical sampling to adjust the Census data for non-apportionment purposes, such as the distribution of federal funds or redistricting. Indeed, under the district court's reading of 13 U.S.C. § 195, use of

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[29] 15 *Writings of Thomas Jefferson* 164-65 (A.A. Lipscomb & A.E. Bergh eds., 1905) (Letter to Benjamin Waterhouse, March 3, 1818).



statistical sampling to adjust the census data for such purposes is *required*. Through the Census 2000 Report, the Secretary has determined that the use of statistical sampling is "feasible"; therefore, the Secretary "shall" authorize its use. 13 U.S.C. § 195.[30]

In *Wisconsin*, this Court held that the Secretary's decision not to adjust for the differential undercount in the 1990 census through use of a post-enumeration survey ("PES") was well within the constitutional bounds of discretion. *See* 517 U.S. at 19-20. "In light of the Constitution's broad grant of authority to Congress, the Secretary's decision not to adjust need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," *i.e.*, to provide a basis for reapportionment of Representatives in Congress. 517 U.S. at 20.

Census data have important consequences unrelated to the reapportionment function delineated in the Constitution. For example, the Federal Government considers census data when dispensing funds through federal programs to the States, and the States may use census results in drawing

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[30] 13 U.S.C. § 141(c) requires the Secretary to produce tabulations of populations for use in legislative apportionment or districting of each State. Pursuant to 13 U.S.C. § 183(a), the Secretary is required to transmit to the President "the data most recently produced and published under this title" for use in "administering any law of the United States in which population or other population characteristics are used to determine the amount of benefit received by State, county, or local units of ... government." Neither requirement deals with apportionment of Representatives among the several States.

intrastate political districts. *See Wisconsin*, 517 U.S. at 6. *Wisconsin* did not consider whether statistical adjustment could be compelled for those non-apportionment functions of the census. Since *Wisconsin* was decided, the Secretary has revised his predecessor's determination and has concluded that the use of statistical sampling is necessary, desirable, and feasible. *See generally* J.A. at 34-340 (*Census 2000* and *Census 2000 Operational Plan*). Thus, unlike the situation in *Wisconsin*, the Secretary is now *required* by section 195 to use statistical sampling to adjust the census results for non-apportionment purposes.[31]

Even if this Court affirms the district court's judgment, it should require adjustment of the 2000 Census for non-apportionment purposes. In effect, the Census Bureau must provide two sets of census data: an unadjusted set for apportionment, and an adjusted set for all other purposes. As a practical matter, the Census Bureau will not be able to use sampling in its Non-Response Follow-Up, but is required to proceed with the post-enumeration survey, or ICM. These adjusted figures will permit a fair allocation of federal funds based on actual population, and provide data that will permit redistricting of Congressional, state legislative, and local districts so as to achieve population equality "as nearly as is practicable."[32] Moreover, such use of adjusted data

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[31] Because the Secretary had not then decided that the use of statistical sampling was "feasible" within the meaning of section 195 -- but had instead rejected its use for all purposes -- the Court did not address this issue in *Wisconsin*. 417 U.S. at 19 n.11.

[32] The Constitutional standard applicable to Congressional redistricting derives from article I, section 2 of the Constitution and requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The standard applicable to State redistricting derives from the Fourteenth Amendment's Equal Protection Clause and "requires that a State make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). Essentially the same standard also applies to local redistricting. *See Avery v. Midland County, Texas*, 390 U.S. 474, 484-485 (1968).



is entirely consistent with the requirements of the Constitution. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 527-28, 531, 535-36 (1969) (indicating that census data may be adjusted for intrastate redistricting if justified); *Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (same).[33]

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[33] Some circuit courts have also indicated that States are not required to use official census data when drawing Congressional districts and may adjust the data to correct for differential undercounting. *See, e.g., City of Detroit v. Franklin*, 4 F.3d 1367, 1373-74 (6th Cir. 1993), *cert. denied*, 510 U.S. 1176 (1994); *Assembly of State of California v. U.S. Dep't of Commerce*, 968 F. 2d 916, 919 n.1 (9th Cir. 1992); *Young v. Klutznick*, 652 F. 2d. 617, 624 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982). States are similarly not required to use official census data for drawing State legislative districts, *Burns v. Richardson*, 384 U.S. 73, 91 (1966), and this Court has not indicated that the situation is any different for local governments drawing local districts. Therefore, the Constitution does not prohibit the use of statistically adjusted data in conducting Congressional, State and local redistricting.

## CONCLUSION

For all the reasons stated above, the Court should reverse.

Respectfully submitted,

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# APPENDIX

# APPENDIX

## U.S. CONST., ART. 2, § 1, CL. 3

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States and within every subsequent Term of Ten Years, in such Manner as they shall by Law direct. The Number of representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

## 13 U.S.C. § 141(a)

> The Secretary [of Commerce] shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, including the use of sampling procedures and special surveys.

**13 U.S.C. § 141(b)**

The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

**13 U.S.C. § 195**

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary [of Commerce] shall, if he considers it feasible, authorize the use of the statistical method known as sampling in carrying out the provisions of this title.



**TABLE 1: UNDERCOUNTED POPULATIONS OF CERTAIN OF THE LOS ANGELES-APPELLEES**

(National Population Undercount: 1.6%)

| | |
|---|---|
| City of Inglewood: | 6.316% |
| City of Oakland: | 4.932% |
| City of Houston: | 3.933% |
| City of San Antonio: | 3.918% |
| City of Los Angeles: | 3.830% |
| City of Long Beach: | 3.698% |
| Miami-Dade County: | 3.690% |
| County of Los Angeles: | 3.334% |
| City of New York: | 3.232% |
| State of New Mexico: | 3.074% |
| City and County of San Francisco: | 2.899% |
| County of Alameda: | 2.889% |
| City and County of Denver: | 2.756% |
| City of Detroit | 2.671% |
| County of San Bernardino: | 2.554% |
| City of Chicago: | 2.395% |
| County of Riverside: | 2.381% |
| City of San Jose: | 2.377% |
| County of Santa Clara: | 2.196% |
| City of Stamford: | 1.256% |

Source: U.S. Dept. of Commerce, Bureau of Census, *Report of the Committee on Adjustment of Postcensal Estimates*, Attachments 4, 11 and 12 (Aug. 7, 1992) (attached as Exhibit E of Memorandum in Support of Motion of the City of Los Angeles, et al. to Intervene as Defendants (Apr. 3, 1998)).